contours of the First Amendment.

The motel marquee for a PLAN conference after a spate of bombing plots and clinic attacks blared "WELCOME PRO-LIFE ACTIVISTS–HAVE A BLAST," and some attendees wore firecrackers on their nametags. *Id.* A letter from clinic arsonist Curt Beseda was read to the crowd. The conference "epitomized the brazen yet banal nature of organized antiabortion extremism – a rah-rah atmosphere, like some perverse parody of a pep rally, in which threats of future violence were cloaked as free speech, and past criminal acts were celebrated as valid tools for intimidating fellow citizens." *Id.* The following year, a day after Petitioner Scheidler admitted that he was "casing the place," Summit Women's Health Clinic "protestors" invaded the clinic and expressed their dissent through serious vandalism. *Id.*

Scheidler's parsimoniously applied scruples about violence do not prevent him from visiting Michael Bray, who conspired to bomb over 10 clinics, and Curt Beseda who, in addition to his pyrotechnical prowess, had ties to a group who kidnaped a doctor who performed abortions (and his wife) and held them under death threats for eight days demanding that they sign a pledge to perform no abortions.[7] Stephen J. Hedges, David Bowermaster, and Susan Headden, "Abortion Rights Advocates Have

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[7] The FBI investigated this kidnaping because the death threats made during the abduction in order to secure the pledge violated the Hobbs Act. The kidnapers were members of the band of murderers known as the Army of God, was later convicted of torching two Florida clinics. Joni Scott, "From Hate Rhetoric to Hate Crime," *The Humanist* (Jan./Feb. 1999), *at* www.thehumanist.org/humanist/articles/scott.html.

Alleged a Conspiracy, but the Jury is Still Out," *U.S. News & World Rep.* (Nov. 14, 1994). He spoke frequently with John Brockhoeft, serial clinic arsonist. *Id.* Of his meetings with bombers, he shrugs, "Just because someone commits a crime doesn't mean they are a bad person." *Id.*

As one observer noted, "If Scheidler has argued against the use of violence, it has not always been clear from his writings." *Id.* Among the letters that he sent to his confederates: "Thanks so much for sending the photographs of our gang in front of the bombed-out abortuary – great scene. Appreciate your help. Keep up the good work." *Id.* He told another supporter by letter that a man who abducted a doctor who provided abortion care "has a lot to teach us." *Id.*

Petitioner Operation Rescue has from time to time made public assassination threats against a physician who provides abortion services. Dr. Warren M. Hern reported to the Department of Justice that Randall Terry, founder of OR, led a demonstration on clinic premises during which he prayed for Dr. Hern to be "executed." He repeated his prayerful threat over the radio three years later; two days after that broadcast, the doctor who replaced the assassinated Dr. Gunn of Pensacola was found murdered in Birmingham, with money in his pocket. *See* Dr. Warren M. Hern, Report to U.S. Department of Justice, "Anti-Abortion Activity at Boulder Abortion Clinic 1975-1995," *at* www.drhern.com/jdrpt195.htm.[8]

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[8] Dr. Hern also reported that Scheidler's scheduled appearance at the Boulder clinic was shortly preceded by a brick through the window and proceeded apace with a telephone harassment campaign that was later traced to the wife of the man who had invited Scheidler

In this Court, Petitioners liken themselves to the heroes of this nation's epic nonviolent struggle to end racial disenfranchisement, but elsewhere, the martial metaphor is everywhere. Petitioner Scheidler has made plain his distaste for peaceful protest and his yearning for jihad in other fora. "[W]e will win because we're on God's side. It's a holy war," he told a right-wing Illinois publication. Jill Stanek, "An Interview with Illinois pro-life leaders who make history," *Illinois Leader* (July 15, 2002), *at* www.illinoisleader.com.

As one scholar has noted, "In contradiction to Operation Rescue's prolife stance, much of the organization's language is militaristic." *See* Fuller, *supra.* OR. unlike protest movements that actually are committed to nonviolence, uses "language that evokes images of violence, including words that evoke a militaristic analogy" with the antiabortion movement. *Id.* For example, an OR chapter in Colorado terms its blockades "Minutemen Rescues," evoking the citizens' militia in the American Revolution. *Id.* Other OR literature exhorts, "We are among the front-line troops in the battle for life. Together we will win! We have an army of people. The battle is raging ... The Commander is calling most of us to the front lines." *Id.*

These words match the tactics of PLAN and OR conspirators in their virulence. Self-evidently they bear no

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to town. *Id.* As for OR in the Denver area, one police captain saw no dominant influence of peace when the group came to town. "This never took on the appearance of a peaceful demonstration. It certainly was not nonviolent. It's not peaceful when you rush a police line." *See* Fuller, *supra.*

resemblance to the words or deeds of the Reverend King. Nor are they consonant with any respect for or understanding of the nonviolence principle that underlies Gandhi's and Dr. King's concept of civil disobedience. The nonviolent activist is willing "to incur, but not in turn inflict, suffering," and he is assiduously trained in the use of nonviolent action and in the philosophy of nonviolence. *Id.* OR "trains" its "rescuers" the day of its arrival, and nonviolence is not "explained in any Operation Rescue literature, except in reference to the Bible allowing [violence] when man's laws conflict with God's laws." *Id.*

Those who "express" their protest of abortion with fists, projectiles, and bombs do not stand in any venerated First Amendment tradition. They are in fact criminals, despite Petitioners' apologia for them.

B. Violent Criminal Activity Is Not Heroic Political Dissent.

Apparently, in Petitioners' view, the purity of the criminal's commitment to his principles means that his deeds should go unpunished. Punishing crime regardless of the actor's motivations, Scheidler warns, would snare what popular understanding would brand as "politically correct" activists, too, such as civil rights protestors, environmentalists, and animal rights advocates. (Scheidler Pet. for Cert. at 23.) This contention is among the few unassailably straightforward statements in Petitioner Scheidler's brief.

To the extent that, as Scheidler speculates, PETA, the Sierra Club, or the NAACP acquire dynamite or bombs and plan to use them to demonstrate their disdain for

furriers, power plants, or bigots, they should be treated as criminals regardless of their views about the morality of animal vivisection, global ecology, or equal rights. Any deviation from the neutral enforcement of laws punishing terrorist acts because of sympathy with the actor's viewpoint does violence to the rule of law.

That very evenhandedness is a good thing on which the integrity of our legal system depends. The fact that we cannot elect to leave unpunished some criminals because we appreciate their sincerity while we would punish others appears to have eluded Petitioners. What is good for PETA is good for Operation Rescue, or, as the sponsor of the Hobbs Act put it, "Crime is crime, no matter who commits it." 91 Cong. Rec. at ¶ 11,912 (statement of Rep. Hobbs) (1945).

Petitioners' own view that they have a "moral exemption" from laws that bind the rest of us, that the First Amendment is tensile enough to stretch its protective fabric over their crimes, reflects the same moral smugness and certitude that those convicted of terrorism in connection with their antiabortion holy war demonstrate with such tragic consequences. A rather cavalier attitude toward the consequences for "the enemy" prevails.

Petitioners tell this Court that there were "*only four*" acts or threats of violence in this case. *(See* Scheidler Rep. Br. at 3 n.1 (emphasis in original); OR Pet. for Cert. at 4.) The only conscientious retort to such a contemptuous disregard for the effects of "only four" acts of violence on their victims is to remind Petitioners and the Court that convicted clinic bomber Eric Rudolph committed "only four" acts of violence, exploding "only four" bombs, but killing or injuring dozens, including *amica* Emily Lyons.

These "acts or threats of violence" are the type of conduct that the Hobbs Act was intended to deter and for which Respondents seek to hold Petitioners accountable.

Antiabortion terrorist Rudolph did indeed "HAVE A BLAST" as Petitioner Scheidler suggested. The Birmingham bombing for which he was sentenced to two consecutive life terms on Emily Lyons' birthday, April 11, 2005, capped his trilogy of terror directed against internationalism, reproductive health service providers, and lesbians. Here is a description of Rudolph's "only four acts or threats of violence":

- During the 1996 Olympics in Atlanta where an estimated 50-70,000 milled about, a caller dialed 911 from a pay phone and reported, "There's a bomb in Centennial Park. You have 30 minutes." Twenty minutes later, the military-style backpack placed under a park bench exploded. The blast, set by a self-proclaimed protector of children, injured 111 people and killed Alice Hawthorne, leaving her daughter motherless. *See* Add Seymour, Jr., "Bomber Sentencing Monday in Atlanta: Olympic blast victims will face Rudolph," Atlanta *Journal-Constitution* (Aug. 21, 2005) at 1D. Her husband celebrated what would have been his 18th wedding anniversary observing Rudolph's sentencing for the crime. "Rudolph Sentenced to Life in Atlanta Bombings," *Chicago Free Press* (Aug. 24, 2005), at 7.

- Rudolph's bomb at Atlanta's Sandy Springs Professional Building on January 16, 1997 used 3 1/2 pounds of 1 1/2" long flooring nails, 100' of

twisted galvanized wire, and dynamite. The Sandy Springs Professional Building housed the Northside Family Planning Clinic. Several people were injured, including police officers. *See* U.S. Department of Justice Press Release, "Eric Rudolph Charged In Olympic Park Bombing" (Oct. 14, 1998), *available at* www.usdoj.gov/opa/pr/1998/October/477crm.htm. The bomb that caused the injuries was an anti-personnel device, timed for a second explosion to harm the rescuers. *Id.* Rudolph was sentenced August 22, 2005.

- The Otherside Lounge, an Atlanta lesbian bar, was bombed February 21, 1997. That bomb used 6 ½ pounds of 2" long nails, twisted galvanized wire, and between 30 and 50 half-pound sticks of dynamite. *Id.* Rudolph was sentenced for the crime August 22, 2005.

- At approximately 7:30 a.m., on January 29, 1998, a bomb was detonated at the New Woman All Woman clinic in Birmingham, Alabama. This bomb, which contained five pounds of dynamite, and hundreds of nails, killed off-duty police officer Robert "Sande" Sanderson and maimed *amica* Emily Lyons. *See* "To Hell and Back, *supra*; Jay Reeves, "An unrepentant Rudolph gets life in prison for deadly bombing at abortion clinic," The Associated Press Online (July 18, 2005).

Rudolph clearly esteems himself a holy warrior, a good man who will be hailed as a hero by later

generations. He told the federal judge in Birmingham who sentenced him:

> I will be vindicated – my actions that overcast day in January 1998 will be vindicated. As I go to a prison cell for a lifetime I know that I have fought a good fight. I have finished my course. I have kept the faith.

"Olympic bomber gets two life sentences for attack," *Agence France Presse – English* (Jul. 18, 2005). Similarly, he wrote his mother:

> Perhaps I should have found a peaceful outlet for my opposition to the government in Washington: maybe I should have been a lawyer and fought [for] decency in the face of this rotten system; perhaps I could have taken up teaching and sought to inculcate a healthy outlook in a decidedly unhealthy society. But ... I resorted to force to have my voice heard. However wrongheaded my tactical decision to resort to violence may have been, morally speaking my actions were justified.

Blake Morrison, "Special report: Eric Rudolph writes home," *USA Today* (July 7, 2005) at 1A.

> Rudolph views himself as a holy warrior, a good

man done in by a corrupt system of justice,[9] rather than a terrorist. Petitioners likewise have recast themselves in this Court as peace-loving civil rights activists, rather than the racketeers a jury found them to be based on their "only four" acts or threats of violence. Like Rudolph, Petitioners had a choice: work within the system for change or engage in "acts or threats of violence." According to a federal jury, they chose the latter. It is entirely fair to treat them accordingly, no matter how morally justified they believe themselves to be.

CONCLUSION

There is no free speech right to do what Petitioners did. There is no free speech right to do what Eric Robert Rudolph did. There certainly is no excuse in morality. This Court should recognize the implications of Petitioners' argument that "only four" acts of violence – which could be Rudolph's four bombings – somehow are trivialities unworthy of a close examination by the Court. PLAN, Scheidler, and Operation Rescue do not want this

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[9] In another letter to his mother, Rudolph evinces an appreciation of Herman Melville but a void of self-awareness: "I just finished reading *Billy Budd* by Melville. It's a story about a good man sacrificed on the altar of military-legal expediency. It makes a powerful statement at the end about the relativity of history, and just who ends up being the good guy or bad guy depends on who gets to write the story." Morrison, *supra*. He questions the government's "moral authority to judge a man for murder," Morrison, *supra*, and sanctimoniously offered to "forgive" workers at clinics, workers like Emily Lyons whom he maimed, Sande Sanderson whom he killed. *See* Eric Robert Rudolph, "Statement of Eric Robert Rudolph," *reprinted in* The Birmingham *News* (Apr. 14, 2005) at 9A.

Court to peer under the "free speech" cloak they use to hide their naked aggression toward people seeking medical treatment and people providing it. But this Court must look with a discerning eye past the veil of obfuscation. This Court should make clear that, if anthrax is sent in the mail, the letter accompanying it is not mere speech just because it expresses an opinion. This principle should be no less true of bombs, blockades, and blitzes.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, *et al.*

Petitioners,

and

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* ABNER J. MIKVA AND WILLIAM A. NORRIS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Abner J. Mikva[2] is currently Schwartz Lecturer and Senior Director of the Mandel Legal Aid Clinic at the University of Chicago Law School. Having served in the federal judiciary as well as on the House Judiciary Committee while in Congress, Mr. Mikva has extensive knowledge concerning judicial procedures.

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Squarely at issue in this case is the power of courts of appeals to interpret Supreme Court mandates and remand for resolution of remaining matters. Petitioners' argument that the Supreme Court in *Scheidler II* invalidated trial court holdings that were outside the questions presented, and never even mentioned by the Court, puts this essential judicial role in jeopardy. *Amici curiae* believe that deference to traditional judicial practice and considerations of economy should lead the Court to affirm the Court of Appeals' decision to remand the case.

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[1] *Amici curiae* state that this brief has not been authored in whole or in part by counsel for a party in this case, and disclose that the law firm of Debevoise & Plimpton LLP made a contribution in kind to the printing, preparation and submission of this brief. Written consents of the parties to the filing of amicus briefs have been filed with the clerk.

[2] The current affiliations of Mr. Mikva and Mr. Norris are provided here for identification purposes only, and are not intended to convey the views of their affiliated institutions on the questions at issue.

SUMMARY OF ARGUMENT

No court in the nineteen-year history of this litigation has addressed whether acts of physical violence not premised on extortion or robbery could support an injunction under RICO. When Petitioners presented this Court with other questions in this case two years ago, the Court was appropriately disinclined to reach beyond those questions to address the physical violence issue. Upon remand, the Seventh Circuit Court of Appeals recognized the need to resolve this undecided question and referred it to the district court.

This Court's precedents and notions of judicial economy support allowing the Seventh Circuit's remand to the district court to follow its course. This Court has repeatedly emphasized that it prefers to rule only on the questions presented, leaving the identification and resolution of remaining issues to the courts of appeals. Petitioners' argument threatens to undermine these long-established institutional roles, wasting scarce judicial resources and confusing the issues before this Court. The Seventh Circuit's decision to remand will efficiently resolve the unaddressed question, and should be affirmed.

ARGUMENT

I. THE SEVENTH CIRCUIT AND THE SUPREME COURT HAVE BEEN APPROPRIATELY RELUCTANT TO BE THE FIRST TO ADDRESS THE PHYSICAL VIOLENCE ISSUE.

This case has the potential to place the Supreme Court in the position of analyzing facts in the first instance to determine an issue "which never before in this litigation has been the subject of full briefing or judicial consideration." *National Organization for Women, Inc. v. Scheidler*, 396 F.3d 807, 810 (7th Cir. 2005) ("*National Organization for Women*"). The Court of Appeals, relying on this Court's silence on the physical violence issue in the last venture of this case before the Court, recognized that such a task better suits the district court.

A. No court in this litigation has addressed whether acts or threats of physical violence could support an injunction against Petitioners.

In the first of this case's three ventures before the Supreme Court, the Court held that the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, contains no "economic motive" requirement, and reversed the Seventh Circuit Court of Appeals, which had affirmed the district court's dismissal of the complaint. *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994) ("*Scheidler I*"). On remand to the district court, the jury found 117 RICO predicate acts based on extortion, and four predicate acts based on acts or threats of physical violence not premised on robbery or extortion.

Following additional hearings, the trial court enjoined the Petitioners from certain behavior, including acts or threats of violence. On appeal, the Seventh Circuit held that 21 of the 117 extortion-based violations were sufficient to support the injunction. The Court of Appeals recognized but did not disturb the jury's finding that four acts or threats of physical violence served as a basis for RICO liability.

Two years ago, this case arrived before the Supreme Court for the second time. The Court invalidated the 21 predicate acts found by the Court of Appeals to sustain the jury verdict, and vacated the injunction, because the Court determined that Petitioners had not committed extortion within the meaning of the Hobbs Act. *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003) ("*Scheidler II*"). The Supreme Court further ruled that "[b]ecause petitioners did not obtain or attempt to obtain respondents' property," the remainder of the 117 extortion-based predicate acts were also "fatally flawed." *Id.* at 410. No Petitioner in that appeal challenged the jury's determination that four of the predicate acts constituting the basis for RICO liability were acts or threats of physical violence. Even after Respondents noted the four physical violence acts in their Brief in Opposition, Petitioners did not take the opportunity to ask this Court whether physical violence unconnected to robbery or extortion could support the injunction. In fact, the Petitioners did not even discuss the physical violence issue in their merits briefs. Not having been asked the question, this Court did not provide an answer.

Just as no court addressed this question before *Scheidler II*, neither has any court answered it since the Court's 2003 remand to the Seventh Circuit for further proceedings. The Seventh Circuit identified the unasked and unanswered question, and declined to

read an answer into the Court's silence on the matter. Following long-established practice that vests trial courts with responsibility to address questions prior to appellate review, the Seventh Circuit remanded for a determination whether the four physical violence acts are sufficient to support an injunction. In response to a petition for rehearing *en banc*, the Seventh Circuit observed that "the [Supreme] Court had nothing at all to say about" the topic. *National Organization for Women*, 396 F.3d at 812. "[J]udicial economy and restraint" indicated to the Seventh Circuit that it should not take up the question either, until the district court had an opportunity to speak. *Id.*

This case's current and third foray before the Supreme Court invites the Court to consider "whether a different injunction, tailored to the [four remaining] violations found, would be appropriate." *Id.* As at the time of the *Scheidler II* opinion, this question is better addressed first by a district court.

B. The appellate courts would benefit from the district court's initial review of the outstanding question, and may never need to address it.

The district court is the appropriate forum for resolution of the issue untouched by the Supreme Court for the simple reason of judicial economy. The Supreme Court has hesitated to address and resolve issues in the first instance as a means of avoiding unnecessary rulings, and the district courts have available procedures to support their role as first reviewers. The trial courts are well-positioned to make determinations of fact: they are the first courts litigants approach, they are versed in distilling multifaceted and sometimes unwieldy litigations into questions of law and fact for resolution, and they have

available established processes for expedient initial review.

Petitioners request that this Court consider whether the four physical violence acts can support the district court's injunction without the benefit of the Court's usual foundation of full litigation for considering an issue. Not only does this Court lack the support available to a district court, but also in taking on this role, the Court would deprive itself of fully briefed and developed arguments, and district and appellate court analysis and opinions. "Applying [the Supreme Court's] analysis . . . to the facts of a particular case without the benefit of a full record or lower court determinations is not a sensible exercise of this Court's discretion." *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992) (quoting *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 552 n.3 (1990) (internal quotations omitted)).

Allowing the district court to rule also may extricate the Supreme Court from any cause to interpret the Hobbs Act, a statute reaching far beyond this case. The Seventh Circuit emphasized that the district court might dispose of the case on the facts:

> If and only if the district court concludes that some form of injunctive relief would be justified based on the four remaining predicate acts found by the jury, that court will have to confront a more complex legal issue, namely, whether the acts or threats of violence language in the Hobbs Act may serve as an independent predicate act under RICO.

National Organization for Women, 396 F.3d at 812.

Just as "there is no need for [the Seventh Circuit] to decide a question that may not even be pertinent to the case once the district court has looked at the points

that remain on remand," *id.*, so should the Supreme Court decline to provide the initial review.

II. ALLOWING TRIAL AND APPELLATE COURTS TO IDENTIFY AND RESOLVE REMAINING OPEN ISSUES PROMOTES EFFICIENT ADMINISTRATION OF JUSTICE.

A. The writ of certiorari generally establishes the questions for Supreme Court decision, and issues omitted are typically left to the trial and appellate courts.

Rule 14.1(a) of the Supreme Court establishes that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Sup. Ct. R. 14.1(a). Although Rule 14.1 is prudential in nature, the Court disregards it only in the most exceptional cases, "where reasons of urgency or of economy suggest the need to address the unpresented question in the case under consideration." *Yee*, 503 U.S. at 535. Consistent with that rule, the Supreme Court identifies specific issues for review in its grant of certiorari.

In resolving an appeal, the Court typically declines to decide issues outside the questions identified for resolution in the order granting certiorari. *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 202-03 (2002); *Glover v. United States*, 531 U.S. 198, 205 (2001). Rather, any issues necessary to the final resolution of the case, but outside the writ, are typically left for the circuit court, on remand, to consider and decide. *See, e.g., Quern v. Jordan*, 440 U.S. 332, 348 n.18 (1979); *Sprague v. Ticonic National Bank*, 307 U.S. 161, 168 (1939); *In re Sanford Fork & Tool Co.*,